# *The Tipping Point*

## *Maintaining Independence from Retainer to Report Writing*

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On January 1, 2010, the *Rules of Civil Procedure* were amended following recommendations arising out of the Civil Justice Reform Project. In order to ensure independence, fairness and objectivity[1] expert witnesses must sign an Acknowledgement of Expert's Duty recognizing his/her duty is to the Court and not the party who has retained him. Further, expert reports must contain specific information including, but not limited to: the instructions provided to the expert; the nature of the opinion being sought and each issue it relates to; the expert's opinion on each issue, and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range; a description of the factual assumptions on which the opinion is based; a description of any research conducted by the expert that led him or her to form the opinion; and a list of every document, if any, relied on by the expert in forming the opinion.

These amendments identify the basic framework for expert evidence, however we must still seek guidance from the Court in order to understand what it takes to tip the scales from being an impartial expert to a biased one. This paper reviews various Court decisions and discusses how the Court differentiates between independence and advocacy, the criteria for report writing and the Court's expectations of expert witnesses at Trial.

[1] www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/.

***Independence v. Advocacy***

There are a number of historic English and Canadian cases which have developed the principles to be followed when identifying the duties and obligations of an expert witness. In the leading Canadian case, *Interamerican Transport Systems v. Canadian Pacific Express and Transport Ltd.*[2], the Court adopted the principles set out in the English case of *Ikarian Reffer*[3], stating:

> *An expert witness is called to provide assistance to the court in understanding matters which are beyond the expertise of the trier of fact. Such a witness is not to be an advocate for one party, but an independent expert. Expert witnesses are of course paid a fee by the party calling them, which in itself may be considered to affect their independence. The court will examine the demeanour of an expert in the way evidence is given, in particular whether the expert takes on the role of an advocate for one side, or remains objective in weighing the evidence and attributing value to the opinion. If the expert does not adopt the attitude of a neutral, then the fact that he is being paid or the defendant is his client will cause little or no concern, but that will not be the case if he appears to lose his neutrality. In that case the value of his evidence can diminish significantly.*

An expert who runs afoul of these principles is at risk of having very little weight placed on his evidence or having it ruled inadmissible because it is so tainted by bias or partiality that it is of minimal or no assistance to the Court.

The *Interamerican* and *Ikarian Reefer* principles have been adopted in Ontario and were recently discussed in the Ontario Court of Appeal decision, *Alfano Estate v. Piersanti*[4]. In *Alfano*[5], the Defendant's expert Mr. A, was criticized for delivering a report that

[2] *Interamerican Transport Systems v. Canadian Pacific Express and Transport Ltd*
[3] *Ikarian Reffer [1993] 2 Lloyd's Rep. 68.*
[4] *Alfano Estate v. Piersanti*
[5] Ibid

"*simply parrot(ed)"* the Defendants' position[6]. At trial, Plaintiffs' counsel objected to Mr. A's testimony and argued that he demonstrated a lack of independence and had assumed the role of an advocate. During the trial, it became apparent that a series of emails had been exchanged between Mr. A and the Defendants while he was preparing his report. The Court ordered production of this emails which contained the Defendants' opinion on the facts, issues of credibility, conclusions as to what the evidence is and what legal conclusions should be drawn. In short, the emails confirmed that Mr. A had bought into the Defendants' theory of the case and gave little regard to anything else. In disqualifying Mr. A's evidence, Justice MacDonald stated as follows:

> *….it was very apparent that Mr. A was committed to advancing the theory of the case of his client, thereby assuming the role of an advocate. The content of many of the e-mails exchanged between Mr. A and Mr. Piersanti reveal that Mr. A's role as an independent expert was very much secondary to the role of "someone who is trying to their best for their client to counter the other side." After my detailed consideration of the transcripts from the voir dire, I have concluded that these comments correctly describe what took place. Mr. A became a spokesperson for Mr. and Mrs. Piersanti and, in doing so, did not complete independent verification of key issues in accordance with the standards that are expected of an expert. The key issues, crucial to the determination of this case, if determined on the basis of Mr. A. reports would be tainted by the lack of impartiality that is clearly apparent from the content of the e-mails.*

Not all cases of expert bias are as clear as what was seen in the *Alfano* case. The parties may rely on the following factors when arguing that an expert is biased[7]:

1. the nature of the expert's stated expertise or special knowledge;
2. any statements the expert has made publicly or in publications regarding the prosecution itself [Plaintiff or Defendant] or evidencing philosophical hostility toward particular subjects;

[6] Ibid at paras 110 & 111.
[7] *United City Properties Ltd. v. Tong* [2010] B.C.J. No. 145.

3. the expert's history of retainer exclusively or nearly so by the prosecution or the defence;
4. the expert's long association with one lawyer or party;
5. the expert's personal involvement or association with a party;
6. whether a significant percentage of the expert's income is derived from court appearances;
7. the size of the fee for work performed or a fee contingent on the result in the case;
8. lack of a report, a grossly incomplete report, modification or withdrawal of a report without reasonable explanation, a report replete with advocacy and argument;
9. performance in other cases indicating lack of objectivity and impartiality;
10. a history of successful attacks on the witness' evidence;
11. unexplained differing opinions on near identical subject matter in various court appearances or reports;
12. departure from, as opposed to adherence to, any governing ethical guidelines, codes or protocols respecting the expert witness's field of expertise;
13. ….. follow through on instructions designed to achieve a desired result, …, persistent failure to recognize other explanations or a range of opinion, lack of disclosure respecting the basis for the opinion or procedures undertaken, operating beyond the field of stated expertise, unstated assumptions, ….. unsubstantiated opinions, improperly unqualified statements, unclear or no demarcation between fact and opinion, …and
14. expressed conclusions or opinions which do not remotely relate to the available factual foundation or prevailing special knowledge.

This list is not exhaustive and we will likely see further suggestions of expert bias as the Court continues to grapple with the new Rules. To date, the most common arguments for expert bias arise out of the expert's relationship with the retaining party and the expert's failure to consider all of the material facts and/or provide unsubstantiated opinions.

***Relationship Bias***

In *Amertek Inc. v. Canadian Commercial Corp*[8]*,* the Plaintiff successfully argued that an expert's relationship with the Defendant was enough to establish a lack of independence. In *Amertek,* the Defendant's expert had been legal counsel for the Defendant in 14 U.S. cases. He testified that he saw this party as a valuable client and saw it as a source for future work referrals. Based on these facts, Justice O'Driscoll gave little weight to the Defendant's expert testimony and in doing so relied on the following *Interamerican* and *Ikaraian Reefer* principles[9]:

> *[450] In Fellowes, McNeil v. Kansa General International Insurance Co. 1998 CanLII 14856 (ON SC), (1998), 40 O.R. (3d) 456, 460 (O.C.G.D.) per E. Macdonald J.:*
>
> > *Experts must not be permitted to become advocates. To do so would change or tamper with the essence of the role of the expert, which was developed to assist the court in matters which require a special knowledge or expertise beyond the knowledge of the court. . . .If I look to only two of the seven duties and responsibilities of the experts testifying in civil cases that are laid out in The "Ikarian Reefer", [1993] 2 Lloyd's Rep. 68 at p. 81, I have to conclude that this would not be a case for Mr. McInnis to assume the role of an expert. These duties are:*
> >
> > > *(1) Expert evidence presented to the court should be, and should seen to be, the independent product of the experts uninfluenced as to the form or content by the exigencies of litigation.*
> > >
> > > *(2) An expert should provide independent assistance to the court by objective, unbiased opinion in relation to matters within his or her expertise. An expert witness should never assume the role of advocate.*
>
> *[451] In Interamerican Transport Systems Inc. v. Canadian Pacific Express& Transport Ltd. (1995), O.J. No. 3644 (O.C.G.D.), Feldman J. said:*

[8] *Amertek Inc. v. Canadian Commercial Corp et al*. 2003 CanLII 49369 (ONSC)
[9] Ibid at paras 450 – 452

> *I also accept the submission of counsel that in weighing Mr. Gray's opinion evidence, the court must consider the fact that the defendant is a client of his from which he would like to receive more work. An expert witness is called to provide assistance to the court in understanding matters which are beyond the expertise of the trier of fact. Such a witness is not to be an advocate for one party, but an independent expert. Expert witnesses are of course paid a fee by the party calling them, which in itself may be considered to affect their independence. The court will examine the demeanor of an expert in the way the evidence is given, in particular whether the expert takes on the role of an advocate for one side, or remains objective, in weighing the evidence and attributing value to the opinion. If the expert does adopt the attitude of a neutral, then the fact that he is being paid or that the defendant is his client will cause little or no concern, but that will not be the case if he appears to lose his neutrality. In that case the value of his evidence can diminish significantly.*

*[452] In Fenwick v. Parklane Nurseries Ltd. (1996), 32 C.L.R. (2d) 25, 31, MacFarland J. said:*

> *Courts traditionally afford expert witnesses a great deal of respect. This is so because these persons possess an expertise in a particular area of endeavour where lay persons require assistance. The hallmark of an expert witness is that he or she exercise an independent professional judgment in their assessment of the facts of a given case. Where there is any suggestion that a witness who is proffered as an expert has not that professional independence but has rather simply taken on the cause of the client who pays the bills, a court will be most reluctant to place great weight on the opinions of that expert.*

The decision in *R. v. Inco Ltd*.[10] is an example of a fact scenario in which the expert's relationship with Counsel did not disqualify him from testifying. In this case, Inco Ltd. was charged with discharging untreated mine effluent into a water course and failing to report the discharge. The Crown's expert was employed by the Ministry of Environment which was responsible for the investigation and laying the charges. At trial, the Defendant argued that the Crown's expert was biased given his relationship with the Ministry. The trial Judge agreed with the Defendant and declined to qualify Mr.

[10] *R. v. Inco Ltd.* (2006), 80 O.R. (3d) 594 (S.C.J.)

M. as an expert on the ground that he was not independent of the party calling him. On appeal, the Court overturned the Judge's ruling and stated as follows[11]:

> *The independence required of experts may be the subject of special inquiry, particularly where an "in-house" expert is proffered by one of the parties. The inquiry requires that the trial judge, on a voir dire, look beyond the witness' employment relationship or retainer and consider the basis on which the opinion is proffered. Unless the terms of the retainer make the witness an obvious "co-venturer" with the party, as in the case where the witness worked on a contingency fee arrangement which was dependent on the outcome of the case, the trial judge must examine the actual opinion evidence to be offered in a voir dire. The proposed expert's independence can be tested in the usual way, by cross-examination on his or her assumptions, research and completeness. The trial judge can then assess whether the expert has assumed the role of advocate.*

Accordingly, the mere fact that a relationship exists between the counsel and the expert is not enough to establish bias. It is up to the lawyer to bring out the hallmarks of bias during cross-examination.

### *Bias by Omission*

Experts must not ignore material facts which they feel may weaken their opinions and must always state all of the facts and assumptions the opinion is based on[12]. A prime example of this type of bias is found in *Aherne v. Chang*[13]. In this decision, Master Short reviews the "*now more clearly defined duties owed to the court by expert witnesses"* in light of the extraordinary expert bias demonstrated by Mr. G, an eminent architect, who testified in support of the Defendants in *Cala Homes (South) Ltd. V. Alfred McAlpine Homes East Ltd.*[14]. Mr. G. was best known for his article

[11] Ibid
[12] Supra at note and note
[13] *Aherne v. Chang* 2011 ONSC 2067 (CanLII)
[14] *Cala Homes (South) Ltd. v. Alfred McAlpine Homes East Ltd.,* [1995] FSR 818, (1995) IP & T Digest 18

entitled ‘The Expert Witness: Partisan with Conscience’ which set out, in part, the approach an expert should take when preparing a report for use in a litigation matter.

In his article, Mr. G. openly acknowledges that an expert witness runs the risk of becoming partisan and, given the nature of the “game”, it is well within his right to omit material facts if necessary. Master Short quotes this passage from Mr. G’s article:

> *How should the expert avoid becoming partisan in a process that makes no pretense of determining the truth but seeks only to weigh the persuasive effect of arguments deployed by one adversary or the other?*
>
> *. . . the man who works the Three Card Trick is not cheating, nor does he incur any moral opprobrium, when he uses his sleight of hand to deceive the eye of the innocent rustic and to deny him the information he needs for a correct appraisal of what has gone on. The rustic does not have to join in: but if he chooses to, he is 'fair game'.*
>
> *If by an analogous 'sleight of mind' an expert witness is able so to present the data that they seem to suggest an interpretation favourable to the side instructing him, that is, it seems to me, within the rules of our particular game, even if it means playing down or omitting some material consideration. 'Celatio veri' is, as the maxim has it, 'suggestio falsi', and concealing what is true does indeed suggest what is false; but it is no more than a suggestion, just as the Three Card Trick was only a suggestion about the data, not an outright misrepresentation of them.*

Mr. G’s opinion is completely at odds with the principles enunciated in *Iberian Reefer* and *Interamerican* which, among other things, requires experts to state all of the facts or assumptions upon which their opinion is based and should not omit from consideration material facts that could detract from their opinions. Master Short wholeheartedly supported the comments made by Justice Laddie in *Cala Homes* in response to Mr. G’s views:

> *The whole basis of Mr G’s approach to the drafting of an expert’s report is wrong. The function of a court of law is to discover the truth relating to the issues*

> *before it. In doing that it has to assess the evidence adduced by the parties. The judge is not a rustic who has chosen to play a game of Three Card Trick. He is not fair game. Nor is the truth. That some witnesses of fact, driven by a desire to achieve a particular outcome to the litigation, feel it necessary to sacrifice truth in pursuit of victory is a fact of life. The court tries to discover it when it happens. But in the case of expert witnesses the court is likely to lower its guard. Of course the court will be aware that a party is likely to choose as its expert someone whose view is most sympathetic to its position. Subject to that caveat, the court is likely to assume that the expert witness is more interested in being honest and right than in ensuring that one side or another wins. An expert should not consider that it is his job to stand shoulder-to-shoulder through thick and thin with the side which is paying his bill.*

***SUMMARY***

The changes to the *Rules of Civil Procedure* do not detract from the fact that plaintiff and defence counsel will select an expert with credentials and a reputation they can rely on, that the experts will be paid for their opinion and it is up to counsel to ensure she provides the expert with all of the relevant materials. Having said that, these changes bring us one step closer to ensuring the relationship between the lawyer and the expert is as transparent as possible. Master Short sums this conundrum up best when he states at paragraph 61 of the *Aherne* decision:

> *The Court now expects and relies upon frank and unbiased opinions from its experts. This is a major sea change which requires practical improvements to past opaque processes. How are long time plaintiffs' and defendants' experts to be "trusted" to change their stripes? At the initial stages, skilled, licenced professionals clearly must be taken at their word that, on principle, they take their Form 53 Undertaking to the Court seriously. It is certainly my expectation that they are clearly promising to bring a new, transparent and objective mindset to the drafting of their reports and to their subsequent testimony.*

It is clear from these decisions that the Courts are taking the changes to the Rules regarding expert evidence very seriously. Ultimately , regardless of the relationship the expert has with the party or assistance provided to counsel during the course of the

litigation, the expert must write his opinion and testify at trial impartially, or risk having his credibility questioned in front of the Court, counsel and his peers.

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